No. 303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA,

Appellant,

v.

VON'S GROCERY COMPANY and
SHOPPING BAG FOOD STORES,

Appellees.

On Appeal from the United States District Court
For the Southern District of California,
Central Division

MOTION OF APPELLEES TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Appellees Von's Grocery Company and Shopping Bag Food Stores move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the District Court of the United States for the Southern District of California, Central Division, dated December 16, 1964, in a civil antitrust case charging violation of Section 7 of the Clayton Act, as amended, (15 U.S.C.

§ 18). The District Court held, after trial, that the merger of Shopping Bag Food Stores into Von's Grocery Co. on March 28, 1960, did not violate Section 7 of the Clayton Act.

A more complete Statement of the case than that contained in the Jurisdictional Statement is necessary for consideration of the Question Presented.

1. **History of the Action.**

Three different District Judges of the United States District Court for the Southern District of California, Central Division, have ruled adversely to the plaintiff on various phases of this action. The complaint was filed on March 25, 1960, and, after taking evidence, Judge William C. Mathes on March 28, 1960, denied the plaintiff's Motion For A Temporary Restraining Order, whereupon the merger was consummated. Plaintiff's Motion For A Preliminary Injunction to require that the former Shopping Bag be operated as if it were a separate entity from Von's was denied by Judge Mathes by order dated June 13, 1960. On March 28, 1962, Judge Albert Lee Stephens, Jr., denied the plaintiff's Motion For Summary Judgment. After trial on the merits, Judge Charles H. Carr on September 14, 1964, ordered Judgment for the defendants.

2. **The Agreed Line of Commerce And Section of the Country.**

The parties agreed and the District Court found that the relevant line of commerce is "groceries and related products taken as a whole," and the relevant section of the country is the Los Angeles Metropolitan Area which

is comprised of Los Angeles and Orange Counties. (Fdgs. 14, 15.) There was no issue in the case with respect to the effect, if any, of the merger upon suppliers, and no evidence was offered on that subject. (Fdg. 16; Pretrial Conference Order Sec. VIII, Par. 6(c).)

3. The Merging Companies and the Market Structure.

On March 25, 1960, when the complaint was filed, Von's operated 28 retail grocery stores, all of which were located in the Los Angeles Metropolitan Area. It was the successor to a family partnership which commenced doing business in 1932 with the grocery concession in a single small store. Thereafter, through internal growth, it developed into a 28-store chain, largely family owned and managed, with annual sales of $86 million in 1959. (Fdgs. 2, 3.)

Shopping Bag also had its origin in depression days, being the successor to a partnership which commenced operating in a single grocery store in 1930. It grew through internal expansion into a 38-store chain, largely family owned and managed, with sales of $84 million in 1959. Thirty-six of its stores were located in the Los Angeles Metropolitan Area and two were located in adjacent San Bernardino County. (Fdgs. 6-10.)

Neither Von's nor Shopping Bag had any prior merger history. After the merger in 1960, combined Von's and Shopping Bag operated less than 1.4% of all grocery stores in the area. (Fdg. 73.) Their combined market

share in 1960 was 7.5% of total grocery store sales and 6.9% of the food store sales.*

Prior to the merger, Von's stores were located for the most part in the southern and western portions of the Los Angeles Metropolitan Area, while Shopping Bag's stores were located in the northern and eastern portions of that area. (Tr. 1072-73; 2058, 2068-70, 2185-86; Dx. J, K, M-R, AF, BD, BE.) Thus, the operations of the two companies complemented each other with little overlap in the geographical areas each served. (Fdgs. 4, 10, 12.) In Finding 53, which focused on this specific question, the District Court found that Von's and Shopping Bag were competing for the same customers in "only four or five areas."

Appellant is in error in its effort (J.S. 7-8) to inflate the amount of overlap. For example, the reference to $43 million in sales by allegedly competing stores of the two companies (J.S. 7, 13) represents *total* sales by those stores, rather than the pertinent figure, namely possible sales to customers in the more limited areas from which stores of the two concerns could possibly draw the same customers. Moreover, Appellant totally ignores the

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* Appellant's Statement (J.S. 5) relies upon 1958 figures (two years before the merger) showing slightly larger market shares for the merging companies and indicating that in terms of sales the combined companies would have been the largest grocery chain in the area had they been merged in that year. However, in 1960, the year of the merger, the market shares of the merging companies had declined and the merged company was second to Safeway, showing the vigor of competition and the failure of the merged entity to keep pace with the market leader. (Fdg. 74; Tr. 1958-2009.)

fact that there were stores of other concerns readily available to the population in the overlap areas (Dx. BF). It is also clear that the draw area varies from store to store and cannot be determined by mechanical tests. (Tr. 2018, 2024-25; Dx. AV.) Responsible officials of Von's and Shopping Bag concluded that the merger was feasible in part because there was so little overlap (Dx. BA), and in this view they were supported by both prior and subsequent surveys. (Kruger, Corey, Miller and Hinson affidavits, Dx. M-R, AA-AE, BB, BE.) Indeed, far more Shopping Bag stores overlapped trading areas of other Shopping Bag stores than of Von's stores. (Dx. AV.)

4. **The Market Structure.**

The grocery industry in the Los Angeles area is highly fragmented. There are more than 3,600 separate grocery concerns operating some 4,600 grocery stores in the area. (Fdg. 23.) In 1958, the leading 20 grocery chains in the area had only 57.4% of the business and since that time their market share has declined. (Fdgs. 78-80.)

The Von's-Shopping Bag merger did not produce any appreciable change in the structure of the market. The market share of the 12 largest firms increased only by 1.2% from 48.8 to 50%, and the market share of the top 20 increased only ½ of 1% from 56.9 to 57.4%. (Fdg. 78.)

The decade prior to the Von's Shopping Bag merger was marked by a decline in the relative positions of the leading chains and the growth of smaller concerns in

the Los Angeles area. The market share of the leading grocery chain in 1960 (Safeway with 146 stores and an 8% market share) has been steadily declining since the 1930s when it had more than 1,000 stores. (Fdgs. 18, 27, 74.) The market share of the top two chains decreased from 21.1% in 1948 to 14.3% in 1958. (Fdg. 27.) The market share of the leading three, four and five concerns declined between 1952 and 1960. (Fdg. 80.) The increase in the last decade in the share of the top 8-20 chains, cited by appellant (J.S. 8-9), obviously resulted from a growth of the smaller firms, some of which are recent entries in the business. (Tr. 2034-36) For example, of the 20 top chains in 1958, seven were either not in existence at all or had only one store in 1948. (Fdgs. 27-28, 78-80.)

Following 1958, three of the top 20 went into bankruptcy and the bulk of their stores were sold to single store operators and small chains. (Tr. 1127, 1199-1202, 1246-48.) Five of the largest national grocery chains (A&P, Safeway, Kroger, Acme Markets and Food Fair) are now doing business in the area, as well as a number of strong regional chains, and a large number of viable smaller chains and single store operators. (Fdgs. 75-77.)

5. **Ease of Entry.**

The record shows that there are no substantial barriers to entry into the grocery business in the Los Angeles area and that excellent opportunities for growth and success are available to any qualified new entrant. In 1960, 128 grocery stores were opened by new entrants, and

there were 119 openings by concerns operating at least one other store. (Fdg. 47.) Concerns operating two or more stores increased from 96 in 1958 to 150 in 1962. (Fdg. 46.) Eighteen of the 30 government industry witnesses entered the grocery business after 1948. (Fdg. 48.)

6. **Cooperatives.**

One of the reasons for the continued success of smaller concerns is the existence in this area of two of the largest cooperative buying organizations in the world, namely Certified Grocers of California, Ltd.* and Orange Empire Co-op. By joining one of these cooperatives, the small grocer can place merchandise on his shelves at a cost comparable to that of the large chain. These cooperatives carry a full line of groceries and related products, except for meat, produce and certain dairy items. The District Court found, with full support in the evidence, that the large chains do not have a substantial advantage in the purchase of those items not carried by cooperatives. (Fdgs. 29-38.)

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* Small grocery retailers have always been and still are the primary source of Certified's business. Therefore, as Judge Carr said (App. A to J.S. 14a-15a), "considerable weight" should be accorded the testimony of Campbell Stewart, former President of Certified, who expressed the emphatic view that the merger of Von's and Shopping Bag will not adversely affect either the competitive opportunities of small retailers or the vigor of competition in the Los Angeles Metropolitan Area. (Dx. BB.) In this view Mr. Stewart was fully corroborated by the testimony of Joseph Hughes, Chairman of the Board of Certified. (Dx. AZ.)

With purchasing power thus equalized, success in the grocery business in this area depends upon the experience and ability of the competitor, not size or number of stores. This is reflected in the inability of the market leaders, Safeway and Ralphs, over the years to maintain, much less increase, their market shares, and in the continued growth of the smaller concerns, including new entrants. (Fdg. 27.)

The number of grocery stores in the area has declined largely because of the development of the supermarket and more widespread use of the automobile which deprived the former small corner grocery store of its local, neighborhood monopoly. (Fdg. 24.) Nevertheless, there is scarcely a single household in the Los Angeles Metropolitan Area which does not have a choice of from three to ten competing grocery stores within convenient shopping distance. (Fdg. 26.) The evidence is uncontradicted that small competitors in this area flourish and that consumers are well served. (Dx. AX, AY, AZ, Tr. 2188-89, App. A. to J. S. 19a.)

7. **Industry Witnesses.**

Twelve single store operators, nine representatives of concerns operating from two to nine stores, nine representatives of chains having ten or more stores, five officials of Von's, and five suppliers testified* that the merger was

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* To shorten the actual time of trial, the witnesses furnished affidavits which were introduced in evidence as their direct testimony, pursuant to agreement of the parties and with the approval of the District Court. The parties had full opportunity to cross-examine all witnesses.

not likely to and could not substantially lessen competition or tend to create a monopoly. Each gave specific reasons for his conclusions. Except for three Von's officials, none of these witnesses was cross-examined by the Government and their testimony stands unchallenged.

The Government furnished stereotyped affidavits of thirty industry witnesses, 26 of the 30 being proprietors of relatively small stores doing a gross annual volume of less than $1 million. Eighteen of these 30 government witnesses were cross-examined; the depositions of the other twelve were noticed, whereupon the Government stipulated that the cross-examination of the eighteen was representative of all. Although more than three years had elapsed since the merger, none of the Government witnesses could point to any lessening of competition or any real likelihood thereof, and in fact many complained of too many competing stores and too much competition. (Tr. 515-516, 599-602, 688, 1002-5, 1038-40, 1285, 1307, 1799-1803.)

8. **Decision of The District Court.**

In his Memorandum Opinion, Judge Carr held that it could not be concluded "that the merger in question would probably lessen competition in the Metropolitan Area either at the time of the merger or in the foreseeable future." He stated that "competition in the area appears to remain vigorous, open to anyone and especially those with experience and training, and the consumer is reaping the benefit." (App. A to J.S. 19a.)

Counsel for defendants were directed to prepare proposed findings of fact and conclusions of law and judg-

ment. At a conference of the parties and the Court, District Judge Carr directed that changes be made in the proposed findings and said changes were made. (Tr. 2766). Later a full hearing was held to settle the findings and additional changes were made. (Tr. 2766-2845.) The Findings of Fact and Conclusions of Law and the Judgment were signed and filed on December 16, 1964. Thereafter appellant filed a motion under Rule 52(b) of the Federal Rules of Civil Procedure for amendment of the findings and for additional findings. This motion was denied by Order signed and filed on January 8, 1965. This appeal followed.

ARGUMENT

The 1960 merger of Von's and Shopping Bag brought together two local concerns, with small market shares, in a highly fragmented, vigorously competitive market.* Neither Von's nor Shopping Bag had any prior merger history and neither operates beyond Southern California. Merged, they operate only 1.4% of the total grocery stores in the Los Angeles area and their market share is only 7.5% of total grocery store sales and 6.9% of total food store sales.

I.

The District Court found and held that competition was as "intense and vigorous" at the time of trial as it had been four years earlier at the time of the merger and that there was no reasonable probability of lessening of that vigor in the foreseeable future. (Fdg. 52, App. B, p. 40; App. A, p. 19a.) The evidence was overwhelming that this particular merger in this particular competitive setting would not tend to lesson competition, either substantially or otherwise. (Fdg. 82, App. B, pp. 50a-51a; Dxs. AX, AY, AZ, BA, BB.) Neither the "industry" witnesses called by the government nor those called by defendants could point to any diminution of competition

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* In the Los Angeles area where there are more than 3,600 separate grocery concerns, *twenty* grocery chains share the same portion of the market (approximately 58%) as did the top *two* banks after merger in the *Philadelphia National Bank* case. 374 U.S. 321, 331.

following the merger, and most of them observed a contrary trend.* (See Statement, supra, 8-9)

Appellant does not challenge either the District Court's finding or the testimony of the industry witnesses regarding the continuing vigor of competition in the grocery business in the Los Angeles area. Instead, Appellant's argument comes down to a lament for a bygone era. The Jurisdictional Statement speaks nostalgically of the "old style grocery," comparing it favorably to the modern supermarket from the standpoint of potential entrants into the grocery business. Appellant points to a "continuous decline in the number of small, single store operators and an increasing trend to large scale supermarkets" (J.S. 8), and Appellant notes that "small firms" cannot compete in effective advertising with the larger operators. (J.S., p. 12, 17).

This argument, which lies at the heart of the Government's case, has two fatal flaws. First, the decline of the old style grocery store occurred long before the Von's-Shopping Bag merger and for reasons that had no reference to it (Fdgs. 17-24, App. B, p. 26a-28a). The old style grocery store is disappearing because the

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* For example, there was testimony from the Government "industry" witnesses that "there is more competition now than ever" (Gertmenian, Tr. 688); that the area "has always been extremely competitive", that a "tremendous competitive situation * * * has occurred in the last few years" and competition "definitely" got tougher (Mekjian, Tr. 1038-1040); that a general price reduction in 1961 enabled the chains and single store operators to become more competitive with the discount houses (Palmer, Tr. 1147); that competition has been more vigorous since the merger, "that is a trend." (Dick, Tr. 1832-33.)

public has shown a marked preference for the supermarket. Whether run by an individual or a chain, the supermarket offers a wider range of products on a more efficient and more attractive basis. The transition from the old style grocery to the supermarket began before World War II and by the mid-1950s was very nearly complete. The merger of Von's and Shopping Bag, two chains of supermarkets, had nothing to do with this merchandising transition.

The second flaw in the Government's argument is that while the old style grocery store has been disappearing, the small businessman in the grocery industry has not. With the aid of cooperative buying and by exploiting the natural advantages which flow from centralized control of a small business, the grocer who operates one or a few stores can succeed and grow despite chain competition. It has happened too often, as the record shows (Fdg. 44), for there to be any question of the extraordinary opportunities open to small grocery concerns both before and since the merger here in question.

II

Judged in terms of current realities in grocery store business in the Los Angeles area, the Von's-Shopping Bag merger was without competitive significance. There are more than 3,600 separate grocery concerns operating approximately 4,600 grocery stores in the Los Angeles Metropolitan Area. Evidencing the lack of concentration, 20 chains share 58% of the sales in the area. The

market shares of the leading chain and of the leading two, three, four and five chains declined in the decade prior to the merger, as smaller concerns grew and captured a larger share of available business.

Entry into the grocery business in Los Angeles is readily made by operators of ability and experience. The record is replete with evidence of many new grocery concerns which have grown and prospered in Los Angeles in recent years. In 1960 alone, 128 new concerns entered the grocery business in the Los Angeles area. Seven of the 24 concerns operating 10 or more grocery stores in 1961 opened their second store sometime after 1952. (Fdgs. 46-48).

In the Los Angeles market, Von's faces competition from stores of the five largest national chains, numerous regional chains and some 3,590 single store operators, backed up by powerful cooperative buying organizations. (Fdgs. 23, 29, 38, 75, 76, 77). The evidence plainly demonstrated that the competitive effectiveness of any store in this area does not depend upon the number of stores operated by the particular concern (Fdgs. 80, 82, Tr. 1961-2; Dx. AX, AY, AZ). Indeed, the toughest competitors usually are the single store operators (Tr. 2432-33; Dx. AX-AZ, BA, BB). In these circumstances, this merger had and will have no significant impact on competition in the retail marketing of groceries and related products in the Los Angeles area.

III

There are persuasive reasons for enabling Von's to expand. Von's was largely family-owned and it operated within a single geographical area. Its acquisition of Shopping Bag was therefore consistent with the "desirability of retaining 'local control' over industry" (See *Brown Shoe Co. v. United States*, 370 U.S. at 315-16). Absentee ownership has been avoided, and management continues to reflect the civic and social concerns of the area in which it operates. Yet Von's and other supermarket operators provide their customers with a range of products and services unknown in the days of the old style grocery, at highly competitive prices which afford only the narrowest profit margins.

Equally compelling reasons support the merger from the standpoint of Shopping Bag. The president and principal stockholder of Shopping Bag was advanced in years and, because of declining profits and thinness of management, he wished to dispose of the company on a favorable basis (Fdg. 12). Shopping Bag's percentage of net income to total sales dropped below 1% in 1959, and the company did not have a strong management team to take over from Mr. Hayden (Fdg. 12). Professor Turner has emphasized the importance of interpreting Section 7 so as not to bar mergers in such circumstances:

". . . Widespread prohibition of mergers would impose serious, if not intolerable, burdens upon owners of businesses who wished to liquidate their holdings for irreproachable personal reasons. Moreover, economic welfare is significantly served by maintaining

a good market for capital assets. By enhancing the value of assets when owners wish to sell, a strong capital assets market increases the rewards of successful intrepreneurial endeavor. . . ." Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Har. L. Rev. 1313, 1317 (1965).

The fact that the acquisition of Shopping Bag enables Von's to enjoy lower operating costs (App. B, p. 24a), is not a ground for invalidating the merger. This would be "not only bad economics but bad law." Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1324 (1965).* Indeed, the primary test of our economic system is whether consumers are well served, *cf. United States v. Philadelphia Nat. Bank*, 374 U.S. at 367, n. 43, and this should not be obscured by attempts to measure a merger against a World War I model of competition.

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* Professor Turner spelled out his reasons as follows:

"Beyond this, there seem to be overpowering reasons against using cost savings as a basis for invalidating conglomerate or other mergers. First, there is the enormous social interest in progress and efficiency, which has represented one of the primary bases for the policy of promoting competition as it has in fact evolved. Second, to forbid mergers that would or might produce substantial efficiencies would narrow substantially the category of acceptable mergers, thereby drastically weakening the market for capital assets and seriously depreciating the price that entrepreneurs could get for their businesses when they wish to liquidate. . . . Third, the protection that this policy would afford to small business, except in the short run, is at best highly conjectural and probably negligible. . . ."

IV

Although this Court has considered a number of merger cases in recent years, none of them would support, much less require, reversal of the District Court judgment in this action. The foundation case under amended Section 7, *Brown Shoe Co. v. United States,* 370 U.S. 294, involved a large national chain which, through a series of acquisitions, had integrated its manufacturing operations with its retail operations to the proven disadvantage of small, nonintegrated, retail competitors. Moreover, the Court said that the tendency toward concentration in the shoe industry was being "accelerated through giant steps striding across a hundred cities at a time." 370 U.S. at 346.

Brown Shoe was amplified in *United States v. Philadelphia Nat. Bank,* 374 U.S. 321, but neither the facts nor the language of that case stand as a barrier to the affirmance of the judgment of the court below. In *Philadelphia Nat. Bank,* the merger produced a bank controlling 30% of a highly concentrated market in which four concerns controlled 90% of the business. Moreover, after the merger, the two leading banks in Philadelphia would have controlled 58% of the total bank assets, deposits, and loans in the relevant market area.

In *Philadelphia Nat. Bank* this Court laid down the much-quoted test that "A merger which produces a firm controlling an undue percentage share of the relevant market, and results in the significant increase in the concentration of firms in that market, is so inherently likely to lessen the competition substantially that it must be enjoined in the absence of evidence clearly showing that

the merger is not likely to have such anti-competitive effects." 374 U.S. at 363. Measured by that test, the Von's-Shopping Bag merger is plainly valid. A combined percentage share of 1.4% of the grocery stores and 7.5% of sales in the relevant market can hardly be regarded as "undue." Cf. *Philadelphia Nat. Bank*, 374 U.S. at 364 n. 41. The increase in concentration is far from "significant": in the decade prior to the merger, the market shares of the leading chains had been decreasing, and, as a result of the merger, the market share of the 20 top chains increased only from 56.9 to 57.4% while that of the leading two concerns increased from 14.3 to 16.6%. Moreover, the evidence from a wide range of industry witnesses clearly showed that the merger is not at all likely to have anti-competitive effects.* (See Statement, pp. 8-9)

In *United States v. First National Bank*, 376 U.S. 665, the merged bank was larger than all of the remaining banks combined, having more than 50% of the bank assets, deposits, and loans in the market area there held to be relevant. This is the only case cited by Appellant in support of its theory that the elimination of competition between Von's and Shopping Bag is automatically invalid. (J.S. 12.) It is plainly inapposite because, unlike the Von's-Shopping Bag merger, the merger of the banks involved in that case produced a bank controlling an "undue" percentage of an already concentrated market.

* The value of industry witnesses was recognized in *Brown Shoe*. 370 U. S. 294, 344. While little weight was given to the testimony of industry witnesses in *Philadelphia Nat. Bank* because of their "failure to give concrete reasons for their conclusion," there is no such shortcoming here. (Dx. AX, AY, AZ, BA, BB.)

In *United States v. Alcoa,* 377 U.S. 271, this Court found that the "line of commerce showed highly concentrated markets," with the domination by a few companies producing an "oligopolistic" structure, completely unlike that present in the grocery industry in Los Angeles. 377 U.S. 278-80. In this setting, the Court found that the acquisition of Rome Cable by Alcoa, the market leader with 27.8%, was a violation of Section 7 despite the relatively small share of the acquired company in the aluminum conductor market.

In *United States v. Continental Can Co.,* 378 U.S. 441, the relevant product market was dominated by six firms having a total of 70.1% of the business. The merger produced a company with 25% of the market which the court found to be violative of Section 7 in an industry where, in sharp contrast to the grocery business in the Los Angeles area, there had been a "history of tendency toward concentration in the industry." 378 U.S. at 461.

The distinctions between the recent decisions of this Court and the instant case are both numerous and substantive. Here, the combined market share is much smaller; there was little overlap in the geographical areas served by each company prior to merger; the market as a whole is fragmented, not oligopolistic in structure; the trend is away from concentration; entry is classically easy; and, moreover, the competitive effectiveness of a particular retail store is not dependent upon the size of the concern which owns it.

CONCLUSION

For the foregoing reasons, the motion to affirm should be granted.

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July 22, 1965